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Supreme Court, U.S.
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No. 01-1746

In The
Supreme Court of the United States

BUSH & BURCHETT, INC. AND JOE BURCHETT,

Petitioners,

v.

FRED RUSSELL, JR. AND REBECCA RUSSELL,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

COME NOW the Petitioners, Bush & Burchett, Inc. and Joe Burchett, by their counsel, with their Reply to the Respondents' Brief in Opposition, and hereby states as follows in support of their Petition for Writ of Certiorari.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. § 1257.

Title 28 U.S.C. § 1257(a) authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." In certain circumstances, the Court has treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court. *Flynt v. Ohio*, 451 U.S.619, 620-621 (1981).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court divided cases of this kind into four categories. The first category includes those cases in which "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. This matter fits into the first *Cox* category because even though a trial has yet to occur in the state courts the determination of the federal issues advanced are conclusive. A determination that the Supreme Court of Appeals of West Virginia violated the Full Faith and Credit clause and the Due

Process clause as alleged by Petitioners would be determinative of this matter, which was a final judgment in the state court when it reached the Supreme Court of Appeals of West Virginia.

The second and third *Cox* categories are inapplicable. However, the fourth *Cox* category includes those case where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be conclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state court for purposes of the state litigation." *Id.* at 482-483. See also: *Florida v. Thomas*, 532 U.S. 774 (2001).

This case is a textbook example of the fourth *Cox* category. Although Petitioners may prevail on the merits on nonfederal grounds, reversal of the state court on the federal issues presented would preclude any further litigation on the relevant cause of action. Furthermore, federal policy would be eroded by continuing to permit the courts of one state, such as West Virginia, from ignoring the clear application of the laws of another foreign state, such as Kentucky, where clearly the laws of the foreign state are controlling. As such, the judgment of the Supreme Court of Appeals of West Virginia appealed from is

final and subject to review by this Court pursuant to 28 § 1257(a).

II. The Federal Issues Presented in the Petition Have Not Been Waived.

Respondents assert that the Petitioners, Joe Burchett and Bush & Burchett, Inc., have waived their Constitutional due process claims which were addressed to both the Supreme Court of Appeals of West Virginia and, more immediately, to this Court. The basis upon which Respondents argue waiver is their misplaced assertion that Petitioners' due process arguments were not presented below. This position is incorrect.

First, Respondents argue that Bush & Burchett did not raise the federal issues until their petition for rehearing after the Supreme Court of Appeals of West Virginia "ruled against them on the purely state-law grounds that they had raised." Respondents' Brief, p. 3. Petitioners Bush & Burchett successfully argued in the Circuit Court that Kentucky, and not West Virginia had jurisdiction. Respondents then appealed to the West Virginia Supreme Court of Appeals.

After the West Virginia court rendered its November 28, 2001 opinion, based upon the court's interpretation of comity, *which was not raised or argued by either party*, Petitioners sought rehearing on the decision, advancing their Full Faith and Credit and Due Process arguments.

Petitioners were never aggrieved until the Supreme Court of Appeals of West Virginia rendered its Opinion and Judgment on November 28, 2001. Petitioners properly addressed their arguments that the November 28, 2001

decision violated the Full Faith and Credit and Due Process Clauses of the United States Constitution in their Petition for Rehearing. The West Virginia Supreme Court of Appeals, however, denied this petition by Order stating, "The Court, *having maturely considered the petition for rehearing* filed by the appellees, Bush & Burchett, . . . doth hereby refuse said petition for rehearing." See Pet. Appendix at 29-30. (Emphasis added.)

Respondents contend that "[i]t is a long-established principle that this Court will not address arguments neither presented nor decided below." Resp. Brief in Opp. at 4. That principle does not apply here. Petitioners' arguments on the issues of Full Faith and Credit and Constitutional Due Process were certainly presented to the court below. And according to the order, the West Virginia court maturely considered the Petitioners' arguments.

All that is necessary is that the lower court "be fairly put on notice of the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). In *Nelson*, this Court addressed whether waiver prevented a petitioner from raising issues of due process which the respondent claimed had not been raised in the lower court. This Court wrote the following:

> It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; *rather it requires that*

> *the lower court be fairly put on notice as to the substance of the issue.* (citation omitted.)

Id.[1] (Emphasis added.)

The Supreme Court of Appeals of West Virginia was most fairly put on notice that its November 28, 2001 decision violated the Full Faith and Credit and Due Process Clauses of the United States Constitution. Surprisingly or not, the court denied the petition for rehearing; however, that denial is not a basis for this Court to refuse the Petition for a Writ of Certiorari. In the *Nelson* case, this Court specifically noted that the lower court in that case had also passed upon rendering any opinion on the petitioner's due process grounds. *Id.* at 470. This Court maintained, though, that the matters of due process were the ultimate grounds for resolution of the appeal. *Id.*

Finally, Respondents insert an editorial footnote addressing the Supreme Court of Appeals of West Virginia's "general rule" "that nonjurisdictional questions not raised at the circuit court level . . . will not be considered." Resp. Brief at 4 n. 1, *quoting Taylor v. Cabell Huntington Hospital, Inc.*, 538 S.E.2d 719, 725 n. 13 (W.Va. 2000). The basis for the petition is the West Virginia court's unconstitutional extension of adjudicative and legislative *jurisdiction*. Therefore, this "general rule" is not applicable.

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[1] As stated in a footnote to the *Nelson* decision, the issue of due process in this case was only raised before the lower court in a statement made during oral arguments. Even under these facts, this Court concluded that the petitioner had not waived its right to raise its due process issues on appeal. *Nelson*, 529 U.S. at 470, n. 4.

The Supreme Court of Appeals of West Virginia advanced the applicable precedent in *Whitlow v. Board of Educ.*, 190 W.Va. 223, 438 S.E.2d 15 (1993). In that case, the West Virginia court wrote the following:

> [W]e are confronted with very limited and essentially undisputed facts. The constitutional issue raised for the first time on appeal is the controlling issue in the resolution of the case. If the statute is unconstitutional, the case should not be dismissed. Furthermore, the issue is one of substantial public interest that may recur in the future. . . . "We believe that the constitutional issue in the case at bench is sufficiently important that it should be considered even though not raised in the trial court."

Whitlow, 438 S.E.2d at 19 (*quoting Barrio v. San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 104, 692 P.2d 280, 283 (1984)).

The Supreme Court of Appeals West Virginia thus recognizes the "substantial public interest" imperative in rendering judgements when the Constitution lies in the cross hairs.

Moreover, Respondents failed to respond or object to the Constitutional arguments in the state court below. By failing to assert their waiver argument in the state court proceedings below, Respondents have themselves waived their waiver argument.

III. Petitioners' Arguments Are Not Premised On False Assertions Regarding The Facts Of This Case.

Respondents are trying to create factual disputes regarding irrelevant facts, as the relevant facts to the issues presented herein are undisputed: Respondent, Fred Russell is a Kentucky resident who was employed by a Kentucky corporation, was injured in Kentucky and received Kentucky Workers' Compensation benefits. All of those facts are undisputed.

Petitioners do not dispute the existence of the construction contract between Petitioner, Bush & Burchett, Inc. and the West Virginia Department of Transportation, Division of Highways. Petitioners do dispute the West Virginia Supreme Court of Appeals' interpretation of that contract, which contradicted sworn testimony from both parties to the contract. Petitioners argued extensively in their briefs below that the contract did not require Bush & Burchett, Inc.'s employees to be protected by the West Virginia Workers' Compensation Fund. Appendix to Petition, pp. 91-94, 158-162. Rather, the contract merely provided that Bush & Burchett, Inc.'s employees be protected in accordance with West Virginia Workers' Compensation law. Bush & Burchett, Inc. complied with West Virginia law when they obtained Kentucky Workers' Compensation coverage for their Kentucky employees. In any event, given that it is undisputed that Respondent accepted Kentucky Workers' Compensation benefits, the contract language is irrelevant. The contract is relevant merely because its provides the only tangential nexus between this case and West Virginia.

Petitioners also disputed Mr. Russell's work history prior to the accident, as a significant portion of Mr. Russell's

prior work history was in Kentucky. It is simply incorrect for Respondents to assert, as they do at p. 6 of Respondents' Brief, that these facts were uncontroverted in the trial court. These facts were extensively argued in the pleadings filed in the state courts. Appendix to Petition, pp. 49-50, 99-100, 144-145, 167-168. However, these facts are not relevant for the determination of the Constitutional issues presented herein due to the undisputed facts which require the application of Kentucky law. Namely, Mr. Russell was a Kentucky resident employed by a Kentucky employer, was injured in Kentucky and accepted Kentucky Workers' Compensation benefits. Because he is seeking tort damages rather than a supplemental Workers' Compensation award, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), must be clarified.

CONCLUSION

For these reasons, and for the reasons set forth in the Petitioners' Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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